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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 185

GILBERT REUTER,

Appellant,

vs.

STATE OF WISCONSIN, EX REL., DEPARTMENT OF AGRICULTURE,

Respondent.

MOTION FOR LEAVE TO FILE ANNEXED STATEMENT AS TO JURISDICTION.

Now come Morris Karon and Walter D. Corrigan, Sr., counsel for appellant, Gilbert Reuter, and members of the bar of this Court and move for leave to file the annexed Statement as to Jurisdiction.

We failed to file the annexed Statement when we presented appellant's petition for allowance of the appeal because we were so pressed for time in preparing the other documents necessary for the allowance of the appeal before the Supreme Court of Wisconsin adjourned (after which it might have been difficult to reach the Chief Justice) that we had no time to prepare the Statement. Also, the respondent's attorney insisted that we seek the allowance of the ap-

peal and get the record to the Supreme Court of the United States at Washington by June 3, 1941, or he would enforce the judgment appealed from. We simply could not prepare a proper Statement in the very short time we had to take the appeal.

Dated at Milwaukee, Wisconsin, June 13, 1941.

MORRIS KARON,
WALTER D. CORRIGAN, SR.,
710 North Plankinton Avenue,
Milwaukee, Wisconsin,
Attorneys for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 185

GILBERT REUTER,

Appellant,

vs.

STATE OF WISCONSIN, EX REL., DEPARTMENT OF AGRICULTURE,

Respondent.

STATEMENT AS TO JURISDICTION.

Pursuant to the requirement of Rule 12 of this Court, appellant submits the following statement as to the jurisdiction of this Court:

(a) This case is brought to this Court pursuant to the provisions of Section 237 of the Judicial Code as amended (28 U. S. C. A. Sec. 344), which permits an appeal from a final judgment in any suit in the highest court of the State in which a decision in the suit could be had, where is drawn in question the validity of a statute of the State on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity.

(b) The State statute, the validity of which is challenged, is Subsection 5(a) of Section 100.03 of the Wisconsin

Statutes, and is found in the official printed edition of the Wisconsin Statutes for the year 1939, at page 1481, which reads as follows:

> "(5) (a) The department shall have jurisdiction upon its own initiative or upon petition in writing to inquire into and determine the regulated milk markets, of the state, and to inquire into any matter pertinent to regulation under this section in any such market and to prescribe such terms and conditions for the purchasing, receiving, handling or selling of regulated milk in such market as it shall find necessary to eliminate unfair methods of competition or unfair trade practices, *which terms and conditions may include schedules of prices for producers, dealers and consumers, or either, and labeling.* * * *."

Appellant also challenged the legality and validity of the order of the respondent, Department of Agriculture of the State of Wisconsin, which, under the foregoing subsection of the statute, created Milwaukee County as a regulated milk market, and required dealers to charge, and buyers to pay, a minimum price of 11¢ per quart retail for milk of 3.8%, or less, butterfat (Complaint, R. 7). The appellant's answer denied the legality and validity of the respondent's order on the ground that the price schedule prescribed by the respondent is based upon a credit and delivery system, whereas appellant did business on the cash and carry plan, by reason of which he could sell at lower prices (Answer, R. 11).

The respondent contended in the Supreme Court of Wisconsin that the reenactment by the Wisconsin Legislature, of Section 100.03 in 1939, substantially the same as the statute was enacted by the 1937 session of the Wisconsin Legislature, enacted into law the aforementioned order of the respondent.

(c) The date of the final judgment of the Supreme Court of Wisconsin sought to be reviewed is March 11, 1941 (R.

43), but appellant's motion for rehearing was not denied by the Supreme Court of Wisconsin until May 20, 1941 (R. 60). Hence, the judgment did not become final until May 20, 1941. The petition for appeal was presented to, and allowed by, the Chief Justice of the Supreme Court of Wisconsin on June 3, 1941 (R. 65).

This appeal is from a final judgment of the Supreme Court of Wisconsin (R. 43) affirming a judgment of the Circuit Court of Milwaukee County, Wisconsin (R. 25), which judgment, among other things, enjoined the appellant from—"3. Selling fluid milk and cream at retail in Milwaukee County for less than the retail prices and in other than the units prescribed in the market order under Section 100.03 of the statutes."

The respondent's complaint (R. 7-10) alleged that the appellant was a retail milk dealer, operating a milk store in Milwaukee County, Wisconsin, and sold such milk at retail for 30¢ per gallon and 9¢ per quart, being less than the minimum price fixed by the respondent's price order. (Other allegations of the complaint are not material to this appeal.)

In his Answer (R. 11) the appellant challenged the legality and validity of the statute and order aforementioned on the ground that "the minimum prices fixed by the Department (respondent) are unjust, inequitable, discriminatory and unfair, and are based on the delivery of milk and cream to the consumer and have no relation to the cash and carry plan under which plan this defendent, Gilbert Reuter, is operating."

The Answer was amended by appellant to challenge the constitutionality of the law, and alleged that the law is unconstitutional—

> "In that it (the statute) is violative of the 14th Amendment of the Federal Constitution by denying to the defendants the equal protection of the laws, by

depriving them of liberty without due process of law in that it delegates judicial and legislative powers to an administrative agency; in that it violates Article I, Section I of the State Constitution by depriving them of life, liberty and the pursuit of happiness, in that it confiscates their property and denies them the right to engage in a lawful calling."

Such amendment to the answer was allowed by the trial court (Bill of Exceptions, R. 30-1).

During the trial of the case in the Circuit Court, appellant again challenged the legality and validity of the statute and order, claiming that the order violated appellant's constitutional rights (Bill of Exceptions, R. 36-8).

The Circuit Court overruled appellant's objections to the constitutionality of the statute and order, and granted respondent a judgment enjoining appellant from selling milk below the price fixed by the Respondent's order (R. 25-27).

In the Supreme Court of Wisconsin the appellant assigned as error (1) that the statute was unconstitutional in violation of the Fourteenth Amendment to the Constitution of the United States; (2) that the statute failed to set up proper standards for fixing prices, and was an unlawful delegation of legislative power to the Department of Agriculture; and (3) that the appellant was denied equal protection of the laws by the mode of administration of the Act (meaning the enforcement of the respondent's minimum price order). The opinion of the Wisconsin Supreme Court (R. 44-53) states (p. 3 of opinion) that the aforementioned issues were raised by appellant in that court.

Under the Wisconsin Supreme Court Rules (*Rule 10, Section 251.264 Wisconsin Statutes, 1939*) *assignments of error* may not be, and hence were not, set forth in a separate pleading, but are required to be stated, and hence were stated, in the appellant's brief (pp. 2 and 3) in that court.

The Supreme Court of Wisconsin is the highest court of

that State in which a decision in the case can be had. The *Constitution of Wisconsin, Article VII, Section 2,* provides:

> "The judicial power of this state both as to matters of law and equity shall be vested in a supreme court, circuit courts, courts of probate, and in justices of the peace. * * *".

Section 3, Article VII of the Wisconsin Constitution provides:

> "The supreme court, except in cases otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be coextensive with the state; but in no case removed to the supreme court shall a trial by jury be allowed. The supreme court shall have a general superintending control over all inferior courts; it shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and other original and remedial writs, and to hear and determine the same."

The constitutional grant of original jurisdiction and power of the Supreme Court is supplemented by *Section 251.08 of Wis. Stats., 1939* (p. 2483), which provides:

> "The supreme court shall have and exercise an appellate jurisdiction only, except when otherwise specially provided by law or the constitution, which shall extend to all matters of appeal, error or complaint from the decisions or judgments of any of the circuit courts, county courts or other courts of record and shall extend to all questions of law which may arise in said courts upon a motion for a new trial, in arrest of judgment, or in cases reserved by said courts."

Section 251.11 (1) Wis. Stats., 1939 (p. 2484) provides:

> "The supreme court shall be vested with all power and authority necessary for carrying into complete execution all its judgments and determinations in the matters aforesaid and for the exercise of its jurisdiction *as the supreme judicial tribunal of the state.* * * *"

The constitutional rights set up in Appellant's Answer and urged in the trial court and in the State Supreme Court, as heretofore shown, are rights invoked under the Federal Constitution (Fourteenth Amendment).

Both the trial court and the State Supreme Court denied appellant those constitutional rights. On page 3 of the Supreme Court's opinion (R. 46) the Supreme Court expressly adverted to appellant's assertion of those constitutional rights, and by affirming the judgment of the trial court, it denied appellant's rights thus asserted. The case, therefore, comes within the jurisdiction of this Court under Section 237 of the Judicial Code as amended (28 U. S. C. A. Sec. 344), which permits an appeal from a final judgment of the highest court of the State in a suit in which the validity of a statute of the State is questioned as being repugnant to the Federal Constitution and the State court decision is in favor of the validity of the statute challenged.

Even where the State court does not expressly determine a constitutional question, this Court has the power to review.

> "Whether the State Supreme Court denied that (constitutional) right or failed to give it due recognition is a question upon which the plaintiffs (appellants) are entitled to invoke the judgment of this court. Our jurisdiction is not affected because the existence of the right for which constitutional protection is claimed depends upon state law." *Fox River Paper Co.* v. *R. R. Com. of Wis.*, 274 U. S. 651, 653, 71 L. Ed. 1279 (and cases cited).
>
> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear

intendment that this was done, the claim is to be regarded as having been adequately presented." *New York* v. *Zimmerman*, 278 U. S. 63, 73 L. Ed. 184.

To the same effect are:

Ferris v. *Frohman*, 223 U. S. 424, 56 L. Ed. 492;

Columbia Water Power Co. v. *Columbia Electric S. R. Co.*, 172 U. S. 475, 43 L. Ed. 521;

St. Louis etc. R. Co. v. *McWhirter*, 229 U. S. 265, 57 L. Ed. 1179;

Am. Express Co. v. *Iowa*, 196 U. S. 133, 49 L. Ed. 417;

Brinkerhoff etc. Co. v. *Hill*, 281 U. S. 673, 74 L. Ed. 1107 (constitutional question raised for first time on rehearing in State Supreme Court).

Appellant has the right to challenge the constitutionality of the respondent's order as well as the State statute under Section 237 of the Judicial Code, as amended (28 U. S. C. A. Sec. 344). This Court has specifically held in *Hamilton* v. *University of California*, 293 U. S. 245, 79 L. Ed. 343, that the phrase "statute of any state" as used in Section 237 of the Judicial Code, is not limited to acts of the State legislature, but is used to include every act, legislative in character, to which the State gives sanction; and the Supreme Court may accordingly review a decision of a State court affirming the constitutional validity of an order of the Board of Regents of the State university making military instruction compulsory.

Here, the respondent, Department of Agriculture, is an administrative agency of the State of Wisconsin (*Sec. 93.02, Wis. Stats., 1939*, p. 1370 et seq.), and the order enforced by the judgment of the State court is legislative in character, to which the State of Wisconsin gives sanction. Respondent's complaint for enforcement of the order shows that the market order enforced by the judgment was made under authority of *Section 100.03, Wis. Stats., 1939* (R. 7).

The questions here involved are not only substantial, but are of the utmost importance to all milk dealers in the State of Wisconsin, as well as to the appellant and to the 3,000,000 consumers of milk and dairy products in the State of Wisconsin.

That *Section 100.03, Wis. Stats., 1939,* is unconstitutional, because it contains an unlawful delegation of legislative power (price fixing to dealer and consumer) has been expressly held by this Court in *Schechter* v. *United States,* 295 U. S. 495, 79 L. Ed. 1570, and *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 79 L. Ed. 446. The State Supreme Court's decision upholding the validity of the statute squarely conflicts with those decisions of this Court.

That the respondent's price order is unconstitutional as a denial of due process, equal protection and freedom of contract in violation of the Fourteenth Amendment of the Federal Constitution is elementary. Admittedly, the minimum price order is based on the cost of credit and delivery sales of milk and cream to the consumer. To require appellant, who sells only on the cash and carry plan, to charge, and the consumer to pay, the same price as the credit and delivery dairies, requires appellant to charge for a credit and delivery service he does not perform, and requires his customers to pay for a service which they do not get and do not want. Appellant has thousands of customers who insist on their right to purchase milk and other dairy products on a cash and carry basis to save the expense of credit and delivery. Appellant is able to make a reasonable profit, although he sells milk from 12¢ to 16¢ per gallon less than the price fixed by the respondent's minimum price order.

There is but little authority on this question, because in most of the cases which sustained price-fixing orders made by administrative agencies, price differentials were allowed between the cash and carry and credit and delivery sales.

In the following cases it was held that a minimum price order of an administrative agency, which prohibited a differential in price for different types of service, was arbitrary and unconstitutional.

State v. *Neveau*, — Wis. —, 294 N. W. 796 (barber code price order);

Great A. & P. Tea Co. v. *Ervin*, 23 Fed. Supp. 70 (1938);

Culberson v. *Ashford*, 18 S. W. (2d) 585 (Tex.).

Accord, *Fairmount Co.* v. *Minnesota*, 274 U. S. 1, 71 L. Ed. 893.

It seems elementary that such an order is arbitrary and tyrannical against both dealers and consumers and violative of the due process, equal protection and right to freedom of contract under the Fourteenth Amendment, when an administrative agency requires a charge and payment for a service that is neither performed nor received.

Copy of the opinion of the State Supreme Court (Exhibit 1) and of the trial court (Exhibit 2) are hereto annexed.

Dated, Milwaukee, Wisconsin, June 12, 1941.

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WALTER D. CORRIGAN, SR.,
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Milwaukee, Wisconsin.
Attorneys for Appellant.

EXHIBIT 1.

STATE OF WISCONSIN, IN SUPREME COURT, JANUARY TERM, 1941.

Nos. 7, 8, 9, & 10.

STATE EX REL. DEPARTMENT OF AGRICULTURE, *Respondent*,

v.

JOHN MARRIOTT et al., *Appellants*.

STATE EX REL. DEPARTMENT OF AGRICULTURE, *Respondent*,

v.

GILBERT REUTER et al., *Appellants*.

STATE EX REL. DEPARTMENT OF AGRICULTURE, *Respondent*,

v.

SYLVESTER T. BAUER et al., *Appellants*.

STATE EX REL. DEPARTMENT OF AGRICULTURE, *Respondent*,

v.

RAYMOND KUNZ et al., *Appellants*.

Appeals from judgments of the circuit court for Milwaukee County: Otto H. Breidenbach, Circuit Judge. *Judgments affirmed.*

These are actions brought by the State of Wisconsin on relation of the Department of Agriculture against the several defendant-appellants under section 100.03 Stats. of 1939 to enforce the provisions of a general market order of the Department of Agriculture and Markets relating to the Milwaukee regulated milk market. The actions were commenced separately, were consolidated for the purpose of trial, and separate judgments were entered on March 30, 1940. Defendants appeal.

The complaints in substance allege that Milwaukee is included in a regulated milk market under sec. 100.03 Stats., 1939; that the provisions of the general order of the Depart-

ment of Agriculture relating to the Milwaukee regulated milk market has been violated by the several defendants with respect to the prices paid to the producers on the basis of 3.5 per cent milk for the milk handled by the defendants; that defendants buy outside of the Milwaukee regulated area at wholesale at prices below the wholesale price either by quart or gallon prescribed by the order; that defendants are selling at retail below the minimum retail prices; that the milk handled is not from premises and equipment equal in sanitation to that required by the ordinances of the city of Milwaukee. The complaint further alleges certain nonconformance with the labeling provision of the order.

By the judgment entered in each action, each defendant is enjoined from (1) selling in Milwaukee county in fluid form milk for which the producers do not receive the price prescribed in the market order under sec. 100.03 Stats.; (2) purchasing at less than the wholesale price prescribed in the market order milk and cream for resale in fluid form in Milwaukee county; (3) selling fluid milk and cream at retail in Milwaukee county for less than the retail prices and in other than the units prescribed in the market order; (4) selling at retail in Milwaukee county fluid cream not labeled as required by the market order; (5) purchasing, receiving, or handling for sale in fluid form in Milwaukee county, or selling in fluid form in Milwaukee county, milk from premises and equipment not equal in sanitation to that required by ordinance of the city of Milwaukee; and (6), from otherwise violating any provision of the present market order for Milwaukee county under sec. 100.03 Stats.

The defendants do not challenge any of the court's findings. In their brief they state the issues as follows: (1) whether the 1939 amendment to sec. 100.03 renders the statute unconstitutional under Section One of the Fourteenth Amendment to the United States Constitution or Section One, Article One of the Wisconsin Constitution; (2) whether the pretended standards set for fixing prices were sufficiently definite to meet the requirements of a valid delegation of legislative power; and (3), whether the defendants have been denied the equal protection of the law by reason of the mode of administration of the act.

MARTIN, *J.*:

The bill of exceptions applicable to each of the four actions contains the following stipulation:

"This stipulation is made upon agreement which is a part of the stipulation that the appellants will challenge on appeal only the constitutionality of the Milk Control Law because of discrimination, unlawful delegation of power, and absence of legislative standards for fixing price, and also the other points of the unconstitutional enforcement of the law."

The first Milk Control Law was enacted as ch. 64, Laws of 1933. It was entitled: "Emergency regulation of the distribution of milk in certain municipalities". Sec. (1) provided:

"It is declared that the provisions of this section are made necessary by a public emergency existing since November 1, 1932, growing out of the present economic depression, the present financial condition of the farmer delivering milk to certain city markets, unfair methods of competition of certain dealers buying milk for resale in such city markets, which conditions seriously affects and endangers the public welfare, health and morals. The provisions of this section shall apply to cities of the first, second and third class having municipal ordinances requiring that all pasteurized milk sold in such cities shall be pasteurized within the limits of the county in which said cities are located, and shall also apply to cities, villages, and to towns adjacent to any city or village, in the same county whose population is furnished with milk by any dealer or dealers operating generally in such cities of the first, second and third class."

The provision limiting the application of sec. (1) of ch. 64 to cities of the first, second and third class having municipal ordinances relative to pasteurized milk was stricken from the act by an amendment, sec. (14) of ch. 470, Laws of 1933. The law as amended became sec. 99.165 Stats. of 1933. It contained a severability clause. The law terminated two years after passage and publication. By amend-

ment in 1935, sec. 99.165 became sec. 100.03 Stats. Subdivision (1) (b) of this section provided that it should apply to cities of the first, second, and third class and to cities of the fourth class having a population of at least five thousand according to the last federal census, also to cities, villages and towns adjacent to any city or village whose population is furnished milk by any dealer operating generally in such cities of the first, second, third, and fourth class. The 1935 act contained a severability clause. The law by its terms terminated June 30, 1937.

By ch. 369, Laws of 1937, sec. 100.03 and 100.04 were repealed and sec. 100.03 was re-enacted. It had no territorial limitations. It was state-wide in its application. It was designated as emergency legislation and terminated not later than December 31, 1939. It contained the following severability clause (100.03 (12), Stats., 1937):

"It is intended that each provision of this section, without regard to whether or not more than one provision is incorporated in the same subsection or subdivision, shall be severable, except provisions that necessarily are so dependent the one upon the other that the one cannot stand without the other; particularly, but without limitation, each exception, express or implied, is severable from each other provision, including each other exception; and if any exception be invalid, this section shall be in force without such exception; and if any provision or exception shall be invalid as to any person, thing or circumstance, the provision or exception shall be construed to except such person, thing or circumstance from its terms."

Sec. 100.03 Stats. of 1937 was amended by ch. 512, Laws of 1939, effective October 17, 1939. This chapter did two things. First it extended the life of sec. 100.03 two years; that is, it provides:

"(2) This section shall cease to be of force or effect when the department shall determine that economic unbalance or unemployment no longer so materially interferes with the ability to produce, to consume, to bargain, or to deal in the production or distribution of fluid milk in Wisconsin as to

continue measurably to threaten results as recited in subsection (1), but in any event not later than December 31, 1941. The department's determination, to whatever effect, shall be in the form of a general order and may be reviewed as such and not otherwise."

It further provides:

"The provisions of this section shall not apply to towns, villages and cities of the fourth class, unless the same are located in a county containing a population of more than seventy thousand."

We will first consider whether the 1939 amendment to sec. 100.03 renders the statute unconstitutional under Section One of the Fourteenth Amendment to the United States Constitution or Section One, Article One of the Wisconsin Constitution, because if the 1939 amendment is unconstitutional, the Milk Control Law by its specific provision (subsection (2) of sec. 100.03 Stats., 1937) expired not later than December 31, 1939. By ch. 512, Laws of 1939, the operation of sec. 100.03 was extended from December 31, 1939 to December 31, 1941. The chapter then provides that the provisions of sec. 100.03 shall not apply to towns, villages and cities of the fourth class unless the same are located in a county containing a population of more than seventy thousand. A substantially similar provision in the Trade Practice Standards Act was held unconstitutional in *State* v. *Neveau*, — Wis. —, 294 N. W. 796, as setting up an improper classification. The unconstitutionality of the classification under ch. 512, Laws of 1939 is virtually conceded by the state upon these appeals. The question is whether the 1939 act, being constitutional in so far as it extends the operation of the Milk Control Law and unconstitutional in so far as it seeks to impose new territorial limitations upon the act is severable in such a way as to save the valid extension features. While the matter is not free from difficulty, we conclude that it is severable. The question is, of course, whether that portion of the act containing the territorial limitations was so important an inducement to its passage as to lead to

the conclusion that the legislature would not have extended the operation of the Milk Control Act without the limitations. In order to answer this question it is important to consider what in effect the legislature did in the portion of ch. 512 which extends the operation of the Milk Control Act. We consider this extension to be a species of re-enactment and the effect is the same as though the existing law which expired on December 31, 1939 had been set out in full in ch. 512, Laws of 1939. Had this been done, the severability clause of the earlier act would have appeared in ch. 512. The fact that it does not so appear we deem immaterial, as there is here virtually an incorporation by reference.

The matter therefore, comes down to this: that the legislature determined to extend the operation of an earlier act which contained a broad severability clause, and when, in addition to this extension, it amended the earlier law, it is a fair conclusion that the amendment was to be as subject to the severability clause as any of the other existing provisions of the extended law. In other words, in determining the severability of the 1939 law, we ought to consider the matter as though the extended law fully amended as to its territorial scope and containing its original severability clause had been fully set forth in the Law of 1939. Under these conditions we think there would be little doubt as to the severability from the act of the invalid territorial limitation which we strike down and a sustaining of the act on the basis of its original territorial scope.

While not strictly in point here, for the reason that we conclude that the severability clause of the 1937 law should be considered a part of the 1939 amendment (ch. 512, Laws of 1939) as though it had been fully set forth in said amendment, by way of analogy at least, there is applicable the rule that an amended statute is to be given the meaning that it would have had if it had read from the beginning as amended. See *State* v. *Local Board of Review* (Iowa), 283 N. W. 87, 92 and cases cited. See also 59 C. J. 1096, sec. 647 and cases under note 24, and *United States* v. *La Franca*, 282 U. S. 568, 576, 51 S. Ct. 278, 75 L. Ed. 551, 557.

Appellants contend that sec. 100.03 (5) (a) constitutes an unconstitutional delegation of legislative power to the Department of Agriculture because no proper standards have been set by the legislature. We consider that appellants' argument in this respect is ruled to the contrary by the decision of this court in *State ex rel. Finnegan* v. *Lincoln Dairy Company*, 221 Wis. 1, 265 N. W. 197, 851, in which the constitutionality of the 1935 Milk Control Law was challenged on substantially the same grounds as urged in the instant case. That law was held valid. To the same effect see *Petition of State ex rel. Attorney General.* (*Tavern Code* Case), 220 Wis. 25, 264 N. W. 633.

Appellants further contend that they were denied the equal protection of the law by reason of the mode of administration of the Milk Control Act. At the trial, in support of this contention, they offered evidence to show that a certain farmer in Waukesha county had shipped fluid milk to the city of Milwaukee and was paid a flat price for it. No objection was made to the particular question and answer. The question was "Q. And on what basis do you ship to them? A. I am paid by the Milwaukee Dairy Distributors a flat price." Then the witness was asked "Q. What do you get? to which counsel for the plaintiff objected as being immaterial. After hearing extended argument by counsel for the parties, the court sustained the objection. From such transcript of the record as is contained in the bill of exceptions, we are of the view that the trial court did not err in excluding this evidence. If the operation of a valid law could be defeated by showing that in some instances other persons or parties violated the law, we fear that a general break-down in law enforcement would follow. Those charged with the enforcement of the Milk Control Act cannot pursue all violators at the same time. In the instant cases there is no showing of nor any proper offer of proof to show an unconstitutional enforcement of the law.

While we differ with the trial court in its conclusion as to the constitutionality of the territorial limitations of the 1939 amendment, it does not necessitate any modification of the several judgments, therefore same must be affirmed.

By the Court: Judgments Affirmed.

IN SUPREME COURT, STATE OF WISCONSIN, JANUARY TERM, 1941.

No. 7

STATE EX REL., DEPARTMENT OF AGRICULTURE,
Respondent,

vs.

JOHN MARRIOTT, ET AL.,
Appellants.

FOWLER, J. (Dissenting) I agree with the opinion of the court that the concluding sentence of sec. 1, Ch. 512, Laws of 1939, stated in the opinion, p. —, is unconstitutional. This sentence was incorporated in the act by amendment of the bill as first introduced. It was held in *State ex rel. Hickey* v. *Levitan*, 190 Wis. 646, 669, 210 N. W. Ill., and *Fitger* v. *Kremer*, 199 Wis. 341, 226 N. W. 310, that when an unconstitutional provision is so incorporated in an act, and the act would not have been passed but for the amendment, the act is invalid, notwithstanding that but for the amendment it would have been valid.

The mere fact that Ch. 512 as a whole shows that the legislature intended that the existing milk control statutes should not be applied to towns and villages and cities of the fourth class unless the same were situated in counties of 70,000 population, demonstrates that the legislature did not intend that those statutes should be applied throughout the state. The decision of the court makes this statute apply throughout the state contrary to the express declaration and intent of the legislature. In the *Hickey* case, *supra*, p. 670, it is said, quoting from *Connolly* v. *Union S. P. Co.*, 184 U. S. 540, 46 L. Ed. 679, 22 Sup. Ct. 431, the "logic of which the *Hickey* opinion declares to be uncontrovertible,"—

"Looking then at all the sections together, we must hold that the legislature would not have entered upon or continued the policy indicated by the statute unless agriculturalists and live-stock dealers were excluded from its operation, and thereby protected from prosecution. The result is that the statute must be regarded as an entirety and in that view it must be adjudged to be unconstitutional

as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the ninth section."

In the *Fitger Case*, p. 341, it is said of a like situation that the "history of the statute leaves no room for such a conclusion (of severability). As originally introduced it did not contain the exemption provision. That came in as an amendment to the original bill, and the court cannot say that it was not an inducement to the passage of the law."

Thus the legislative history of Ch. 512 shows conclusively that the act would not have passed the assembly but for the incorporation of the unconstitutional provision by amendment. The act is therefore void in its entirety, just as were the acts involved in the two cases cited.

The opinion of the court attempts to avoid the effect of the incorporation of the unconstitutional provision by amendment by saying that the chapter was in effect a reenactment of the existing milk control statute, and reenacted the severability provision of that statute, and that the severability provision of that statute saves the constitutional portion of Ch. 512. This to my mind is a manifest *non sequitur*. Ch. 512 being invalid in its entirety it did not reenact the existing statute and therefore did not reenact its severability provision.

It has been the habit of the legislature for several years past to attach a severability clause to all statutes containing several provisions as to the constitutionality of some of which there was doubt. If the legislature intended to save the first part of its section 1 by a severability clause why did it not add to it such a clause? This would have been an easy, plain and habitual way of repelling the inference that the adding of the unconstitutional provision by amendment did not induce the enactment of the chapter. That the legislature did not use its usual tactics in enacting Ch. 512 would seem to indicate intention that the chapter should stand or fall with the portion added by amendment. But whether the legislature so intended or not, Ch. 512 for the reason stated is void, and therefore did not reenact anything.

I am authorized to state that Mr. Justice Fritz concurs in this dissent.

EXHIBIT 2.

STATE OF WISCONSIN, CIRCUIT COURT, MILWAUKEE COUNTY

STATE OF WISCONSIN, ex rel., Department of Agriculture, Plaintiff,

vs.

GILBERT REUTER, JOHN MARRIOTT, RAYMOND KUNZ, SYLVESTER T. BAUER, and others, Defendants

Decision

This is an action brought by the State of Wisconsin on relation of the Department of Agriculture under the provisions of Section 100.03, Wisconsin Statutes, to enforce the provisions of a general market order of the Department of Agriculture & Markets relating to the Milwaukee Regulated Milk Market. These actions were commenced separately against the respective defendants but were consolidated for the purpose of trial. The complaints allege substantially that Milwaukee is included as a regulated milk market under Section 100.03 of the statutes; that the provisions of the general order of the Department of Agriculture relating to the Milwaukee Regulated Milk Market have been violated by the various defendants with respect to the prices paid to producers on the basis of 3.5 per cent milk for the milk handled by these defendants; that defendants buy outside of the Milwaukee Regulated Market area at wholesale at prices below the wholesale prices either by quart or gallon prescribed by the order; that the defendants are selling at retail below the minimum retail prices; that the milk handled is not from premises and equipment equal in sanitation to that required by the ordinances of the City of Milwaukee; and the complaints further allege certain non-conformance with the labeling provision of the Order.

Defendants contend that the Order of the Department of Agriculture and Markets relating to Milwaukee is invalid and that Section 100.03, pursuant to which the Order was made, is invalid and unconstitutional because, it is claimed, it is based upon an improper and unreasonable classification and because it violates Section 1 of the Fourteenth Amend-

ment of the United States Constitution and Section 1, Article I of the Wisconsin Constitution.

Section 100.03 (2) provides "* * *. This provision of this section shall not apply to towns, villages and cities of the fourth class, unless the same are located in a county containing a population of more than seventy thousand." This, it is contended by the defendants, is an unreasonable and improper classification. This point, however, has been decided adversely to defendants' contention in *State ex rel. Finnegan* vs. *Lincoln Dairy Co.*, 221 Wis. 1, where the court said of the 1935 law which exempted municipalities under five thousand:

"In the sale and distribution of milk and its products, the conditions which obtain in cities of any considerable size are widely different than those which obtain in the smaller towns and villages. The basis of the classification would appear much more clearly if the act by its terms applied only to the cities of the first, second and third class. However, the conditions which obtain in the smaller villages and towns where the buyer is personally acquainted with the dealer, and the products distributed are produced locally, are very different than those obtaining in more densely populated areas. We cannot say that the classification has no proper basis in reason. * * * It is considered that the classification has a sound basis in reason and in fact and that the act is not discriminatory in that respect."

The classification in question does not conflict with the rule of equal protection and should not be held invalid upon that ground.

I am of the opinion, after a consideration of arguments and briefs submitted, that the General Market Order relating to the Milwaukee Regulated Fluid Milk Market is valid and that the provisions of Section 100.03 are valid and constitutional.

Defendants offered on the trial to show that the method of enforcement was such as to render the act unconstitutional. This offer was excluded on the ground it was deemed irrelevant to the issues. The testimony so offered was properly excluded. Even if it were established that in some respects not applicable here, the act is violative of

some provision of the constitution, it would not follow that the entire act is so. The statute contains a clear and comprehensive provision with respect to severability. 100.03 (2) provides:

"It is intended that each provision of this section, without regard to whether or not more than one provision is incorporated in the same subsection or subdivision, shall be severable, except provisions that necessarily are so dependent the one upon the other that the one cannot stand without the other; particularly, but without limitation, each exception, express or implied, is severable from each other provision, including each other exception; and if any exception be invalid, this section shall be in force without such exception; and if any provision or exception shall be invalid as to any person, thing or circumstance, the provision or exception shall be construed to except such person, thing or circumstance from its terms."

A more certain declaration of severability could hardly be stated.

The General Order of the Department of Agriculture regulating the Milwaukee Fluid Milk Market is a continuing order of a public administrative body and therefore the discontinuance of an alleged violation after suit commenced does not render the controversy moot.

Trade Comm. v. *Goodyear*, 304 U. S. 257;
State vs. *Manske*, 285 N. W. 378.

I find the following findings to be true and correct and they are therefore adopted as the findings of the court:

Plaintiff's Proposed Finding No. 1.
Plaintiff's Proposed Finding No. 2.
Plaintiff's Proposed Finding No. 3.
Plaintiff's Proposed Finding No. 4 is amended to read as follows:

Each of the said defendants purchased milk outside of Milwaukee County from others who purchased the milk from producers and received it at their plants outside of Milwaukee County and for which the producers have at various times received less than the above prescribed producer prices for milk sold as fluid milk and for which said defendants have at various times paid less than the above

prescribed wholesale prices and which each has sold in fluid form at retail at his store in Milwaukee at various times for less than the above prescribed retail prices and some of which they sold at retail in gallon lots.

Plaintiff's Proposed Finding No. 5 is amended to read as follows:

Each of the said defendants also purchased cream outside of Milwaukee County from others who purchased the milk from producers and received it at their plants outside of Milwaukee County and for which cream, these defendants have at various times paid less than the above prescribed wholesale prices and which each has sold in fluid form at his store in Milwaukee County for less than the prescribed retail prices.

Plaintiff's Proposed Finding No. 6 is found to be true and correct and is, therefore, adopted as the finding of the court.

Plaintiff's Proposed Finding No. 7 is found to be true and correct and is, therefore, adopted as the finding of the court.

Plaintiff's Proposed Finding No. 8 is found to be true and correct and is, therefore, adopted as the finding of the court.

The following Conclusions of Law are found to be true and correct and are, therefore, adopted as the Conclusions of Law of the court:

Plaintiff's Proposed Conclusion of Law No. 1, subdivisions 1, 2, 3, 4, 5 and 6.

Plaintiff's Proposed Conclusion of Law No. 2.

Plaintiff is entitled to judgment in accordance with the findings and conclusions. Plaintiff is entitled to judgment enjoining and restraining each of the defendants, Sylvester T. Bauer, Raymond Kunz, John Marriott, and Gilbert Reuter, in accordance with these findings and conclusions of law.

Plaintiff may submit findings and conclusions in accordance with this decision for signature.

Dated March 19, 1940.

OTTO H. BREIDENBACH,
Circuit Judge.

(4958)

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1941

No. 185

GILBERT REUTER,

Appellant,

vs.

STATE OF WISCONSIN, ex rel.
Department of Agriculture,

Respondent.

BRIEF OF APPELLANT
Opposing Respondent's Motion to Dismiss or Affirm.

Pursuant to Rule 7 (par. 3) of the Rules of this Court, Appellant hereby files his brief in opposition to Respondent's motion to dismiss or affirm.

ISSUES INVOLVED.

There is no issue of fact presented upon this motion. Respondent predicates its motion to dismiss or affirm on

the ground that a substantial federal question is not presented. In our "Statement as to Jurisdiction" pages 10-11), we pointed out that a substantial federal question is presented in this cause, and cited supporting authorities. This brief will be confined to answering the arguments contained in Respondent's Brief against jurisdiction and its motion to dismiss or affirm.

Respondent's counsel digresses from the narrow issues involved in this case by referring to sanitation provisions of the judgment, and to matters outside the record. Appellant does not complain of the sanitation provisions of the judgment, so those are immaterial. Respondent's counsel also discusses the general power of the state to fix prices of commodities. With that general power we are not concerned and we may lay it out of the case at once. The question with which we are concerned on this appeal is the validity of Respondent's administrative order fixing the same price for the milk sold on a credit and delivery basis as on a cash and carry basis.

ARGUMENT.

I.

A state administrative agency may not require a cash and carry milk dealer to charge for a credit and delivery service he does not perform.

We admit that upon *proper occasion* and by *appropriate measures* the state may regulate a business in any of its aspects, including the fixing of prices. That was decided in *Nebbia vs. New York*, 291 U. S. 502, 78 L. Ed. 940, in sustaining the New York Milk Control Law. But the

limitations upon that power were also pointed out in that case (291 U. S., at 525) that in pursuing a price fixing policy, *the state may not act in an arbitrary or discriminatory manner, that the due process clause prohibits a regulatory law which is unreasonable, arbitrary or capricious,* and the means selected for regulation must have a real and substantial relation to the object sought to be attained.

In Milwaukee, the cost differential between credit and delivery sales and cash and carry sales is approximately 4c per quart—that is, it costs about 4c per quart more to sell the same milk on credit and delivery than on the cash and carry plan. The trial court and the State Supreme Court both rejected Appellant's claim that the price-fixing order was invalid for requiring the same price for cash and carry sales as for credit and delivery sales of the same milk. Appellant's answer specifically raised this issue in the trial court (R. 11).

We are informed that in the City of Washington, the identical milk which is sold on a credit and delivery basis at 14c per quart, is sold in cash and carry stores at 9 1/2c per quart.

William Fellows Morgan, Jr., Commissioner of the Department of Markets of New York City, has pointed out that it is the credit and delivery system of selling milk that is detrimental to the public interest, not the cash and carry system. He is reported to have said:

> "I am not particularly interested in the cost of milk to consumers who insist on having it delivered to their homes, as I feel that there is no justification for this type of service any more than there is for eggs to be delivered every morning. Retail milk routes are a luxury service and I am not at all convinced that those who purchase milk in the stores are not paying for a part of this service. Further-

more, this Department is only interested in helping those income groups who are anxious to avail themselves of the savings afforded by purchasing their milk in the stores.

* * * * * * *

"The most wasteful step in getting the milk from the farmer to the grocery store is in the ridiculous system of overlapping deliveries which exists today. This Department has photographs of twelve different independent milk companies serving one individual grocery store between the hours of 6:30 and 8:00 in the morning. Obviously, if that store were to purchase one brand of milk only, the one company could afford to sell the milk for less."

(Quoted in "Pure-Pak News," Devoted to Promoting Health in the Distribution of Pure Milk, Published, Detroit, Michigan, Volume 4, June, 1941).

There is the same wasteful system of overlapping deliveries by numerous dairies delivering a bottle of milk to consumers in the same block. It is for that reason that the cost of delivering milk from the city dairies to the consumer is almost as much as the farmer gets for producing the milk. In Wisconsin, the greatest dairy state in the Union, the farmer gets from 4c to 5c per quart for milk, while in Milwaukee, which is in the heart of the richest dairy section in the nation, it costs about 4c per quart to deliver that milk from the city dairy to the consumer.

In every other business, a lower price for cash and carry sales than for credit and delivery sales for the same commodity has not only been permitted for many years, but has always been approved as necessary, right and just. There is no difference in the milk business warranting different treatment, or warranting the abolition of cash and carry sales.

It should be noted, too, that the statute, and the Respondent's order, purported to have been made thereunder which is enforced by the judgment appealed from, is directed against *consumers* as well as dealers. The statute, in permitting price fixing, provides that the Respondent may fix "schedules of prices for producers, dealers and *consumers* * * *." *Wis. Stats., 1939, Sec. 100.03 (5, a).* Respondent's order enforced by the judgment also provides that "dealers shall charge and *buyers shall pay* * * *" the prices fixed by the Respondent (Complaint, R. 7). Because the judgment appealed from is directed not only against Appellant, but also against hundreds of thousands of consumers living in Milwaukee County, the case is of incalculable public importance.

The object of the Wisconsin Milk Control Law, as the Wisconsin Statute itself provides, *Sec. 100.03 (1) Wis. Stats., 1939, page 1480,* was not to give the credit and delivery dealers a monopoly and prohibit cash and carry sales of milk (obviously, requiring the same price to be charged for cash and carry sales as for credit and delivery sales, prohibits cash and carry sales as effectively as outright prohibition of the cash and carry business); its object was not to prevent consumers buying from cash and carry dealers and thus save the expense of credit and delivery. On the contrary, the statute says its object was to prevent unfair methods of competition and unfair trade practices, *Wis. Stats., 1939, Sec. 100.03 (1), page 1480.* The delegation of power to the Respondent to prescribe prices is only such prices as the Department "shall find necessary to eliminate unfair methods of competition or unfair trade practices," *Wis. Stats., 1939, Sec. 100.03 (5, a) page 1481.* Nowhere does the statute give the Respondent the power

to fix the same price for cash and carry sales as for credit and delivery sales.

We submit that the *due process clause* prohibits a statutory enactment or administrative order which attempts to brand the sale of the same commodity at a lesser price when sold at cash and carry than when sold at credit and delivery, as unfair competition or unfair trade practice. On the contrary when the cost of credit and delivery is eliminated it is obvious that it is unfair to require the cost of credit and delivery to be charged for. It is preposterous and contrary to all notions of honesty and justice to permit an administrative agency to act so arbitrarily and so foolishly to mulct people, particularly the class of consumers who can't afford to pay for credit and delivery service, by prescribing that the cash and carry dealers must charge the same price as credit and delivery dealers. In our opinion, nothing so viciously wrong has ever been attempted against the consuming public. When an administrative agency becomes so arbitrary and tyrannical as to issue such an order, and the state courts give no relief against it, this Court, under the due process clause, should act to protect the people from such tyranny. The courts should not hesitate to declare such an arbitrary and tyrannical order as unconstitutional. There is no precedent in its favor and none should be needed to invalidate what is so obviously unconstitutional. Because the question of the necessity of a price differential between credit and delivery and cash and carry sales is a new one, few cases have passed upon it, but the few cases which have arisen have all held that a minimum price order of an administrative agency, prohibiting a differential in price between credit and delivery and cash and carry sales, or for different types of service, is arbitrary and unconstitutional.

The only authorities dealing with this specific question, which we have been able to find, all hold that it is beyond legislative or administrative power to require the same charge for cash and carry sales as for credit and delivery sales of the same commodity, or to require a charge for a service not performed. Those authorities are cited on page 11 of our "Statement as to Jurisdiction."

On principle, it would seem elementary that such price fixing order, which prohibits a differential between credit and delivery and cash and carry sales is so clearly arbitrary and unreasonable as to be on its face unconstitutional, in violation of due process, equal protection, and the right of freedom of contract guaranteed by the Fourteenth Amendment. Clearly, an order requiring a charge for a service that is neither performed nor received is more than foolish—it is arbitrary, tyrannical and unconstitutional.

The numerous cases cited by Respondent do not touch this question. In none of the cases cited by Respondent was this "cash and carry" question presented. In none was the impropriety of a uniform price order, requiring the same charge for cash and carry sales as for credit and delivery sales, even presented, much less permitted or approved.

Nebbia vs. New York, 291 U. S. 502, 78 L. Ed. 940, is no authority for the claim that the state may fix the same price for credit and delivery sales as for cash and carry sales of the same commodity. On the contrary, the New York law involved in that case specifically provided for at least a 1c differential between delivery sales and store (cash) sales, thus recognizing the lower costs of the stores, which required a lower price to the cash and carry buyer than to the buyer who demanded the luxury of credit and delivery service (291 U. S. at 530).

In *Hegeman Farms Corp. vs. Baldwin*, 293 U. S. 163, 79 L. Ed. 259, an injunction against enforcement of a minimum price order as too low was denied.

In *Borden's Farm Products vs. Baldwin*, 293 U. S. 194, 79 L. Ed. 281, an injunction against the enforcement of price order which fixed a 1c differential between well-advertised milk and unadvertised milk was denied.

In *Mayflower Farms vs. Ten Eyck*, 297 U. S. 266, 80 L. Ed. 675, it was held a denial of equal protection of the laws to deny persons entering the milk business *after* enactment of the milk control statute the benefit of a price differential enjoyed by persons in the milk business *theretofore*.

Milk Control Board vs. Eisenberg Farm Products, 306 U. S. 346, 83 L. Ed. 752, did not involve price fixing, but the question of the power of the federal government to regulate the milk business in interstate commerce.

U. S. vs. Rock Royal Co-op, 307 U. S. 533, 83 L. Ed. 1446, involved price fixing to producers, but there was no question of a proper price differential. In that case, there was a differential in price to various producers.

The other cases cited on page 7 of Respondent's memorandum (*West Coast Hotel Co. vs. Parrish*, 300 U. S. 379, 81 L. Ed. 703; *Mayo vs. Lakeland Highlands Canning Co.*, 309 U. S. 310, 84 L. Ed. 774; *Sunshine Anthracite Coal Co. vs. Adkins*, 310 U. S. 381, 84 L. Ed. 1263; *Opp Cotton Mills vs. Administrators*, 312 U. S. 126; *United States vs. Darby Lumber Co.*, 312 U. S. 100) have no bearing whatever upon the question under consideration raised by Appellant.

In every case, federal and state, which we have been able to find in which minimum price orders were sustained, a differential in price between credit and delivery and cash and carry sales was permitted.

II.

Appellant was not required to exhaust any administrative remedy.

Respondent is wrong in its contention that because Appellant did not exhaust his administrative remedy by an action to review the Respondent's order he is precluded from appealing to this Court.

The State Supreme Court did not hold that Appellant was required to seek administrative review of the Respondent's order by an independent action as a condition of attacking the validity of the order in this action. The rule in Wisconsin is to the contrary. The Wisconsin Supreme Court, only several months before the decision in this case, ruled to the contrary on that very point in *State vs. Neveau*, 237 Wis. 85, 294 N. W. 796, 802-3. The Court there held that a person in Appellant's position was not required to commence an independent action to review an administrative price-fixing order as a condition precedent to challenging the validity of such order when sued by the administrative agency for enforcement, but on the contrary, could assert the invaldity of the order as a defense in the injunctional action brought by the administrative agency to compel compliance with the order. The Court said (294 N. W. 802-3):

> "The defendant did not accept the law, he did not commence this action pursuant to the provisions of the law. When the plaintiff sought to enforce the act by invoking the equity jurisdiction of the cir-

cuit court, the defendant was entitled to put forward any and all defenses which he had, including that of the invalidity of the act. As to that there can be no reasonable doubt."

III.

That the "cash and carry" issue was not expressly referred to in the State Supreme Court's opinion, does not preclude this Court from reviewing the judgment.

That both the trial court and the State Supreme Court denied Appellant his constitutional rights is discussed in Chapter I, *supra*. The constitutional question was properly raised in the trial court and the Supreme Court, as pointed out on page 8 of Appellant's "Statement as to Jurisdiction". By affirming the judgment of the trial court, the State Supreme Court denied Appellant his constitutional rights thus asserted, even though the State Supreme Court did not discuss the subject. Even if the State Court does not expressly determine a constitutional question, that does not deprive this Court of the power to review, but on the contrary, this Court has many times reviewed cases where the State Court failed or neglected to pass upon the federal question raised by Appellant. Those cases are cited on pages 8-9 of Appellant's "Statement as to Jurisdiction."

IV.

The stipulation between Appellant and Respondent (mentioned in Respondent's statement against jurisdiction) does not preclude this appeal nor preclude Appellant from attacking the judgment enforcing Respondent's order.

The purpose of that stipulation was not to waive any question of constitutional law or any other question of law, but simply to abbreviate the bill of exceptions and to limit the appeal to questions of law based upon the record made by the pleadings, findings and judgment. If the stipulation attempted to stipulate *the law*, it would not be binding upon the Court because litigants may not make such stipulations.

Swift & Co. vs. Hocking Valley R. Co., 243 U. S. 281, 61 L. Ed. 722;
Salomon vs. U. S., 7 Cust. A. 5, 8;
60 *C. J.* 50 (Sec. 23).

Litigants cannot, by stipulation, bind courts on questions of law, nor are they permitted by stipulation to prevent courts from deciding questions of law as they should be decided.

We might add that in the briefs in the Wisconsin Supreme Court filed by the former attorney for the Appellant (who died after the State Supreme Court's decision was made in this case, and after which we became attorneys for the Appellant) he disclaimed any intention on his part by that stipulation to waive any question of law in the case. He asserted that the stipulation was made for the purpose of limiting the appeal to questions of law based upon the record made by the pleadings, findings and judg-

ment, but he did not intend to waive attack upon the validity of the judgment or the price-fixing order.

CONCLUSION.

We respectfully submit that this appeal presents a very important and substantial federal question. Respondent's reference to the fact that the statute expires of its own limitation on December 31, 1941, is no ground for denying Appellant and hundreds of thousands of milk consumers in Milwaukee their constitutional rights in the meantime.

Respondent's suggestion that "delay be the only result of this appeal" is the usual cry of the administrative autocrat today, impatient with the citizen who stands up and fights for his constitutional rights. Appellant has not sought to delay justice. On the contrary, he has promptly challenged Respondent's price order whenever it was attempted to be enforced against him, and would gladly have this Court advance the case for argument to avoid any possible delay in this Court. The appeal to this Court was taken as expeditiously as possible. Appellant's motion for rehearing in the State Supreme Court was denied on May 20, 1941, and the appeal was obtained on June 3, 1941. The filing of this brief within the time required by Rule 7, Paragraph 3, has been unavoidably delayed by our time having been taken up with State Court proceedings prosecuted by the Respondent against Appellant, and other milk dealers, which Respondent insisted on pressing, notwithstanding the pendency of this appeal. We asked the Clerk of this Court to extend our time to August 15 for the filing of this brief, and he informed us the brief might be filed, subject to objections that might be made by Respondent's counsel. Respondent's counsel's refusal to extend the time

to August 15, we think, was unreasonable, and if any objection is made by him for the filing of this brief, the same should be overruled. Since the Court has recessed until October, whether we filed our brief on July 31 (the time which the Clerk gave us for the filing of this brief) or August 15, is immaterial and does not harm either side.

Respectfully submitted,

MORRIS KARON,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 185

GILBERT REUTER, ET AL.,

Appellants,

vs.

STATE OF WISCONSIN EX REL. DEPARTMENT OF AGRICULTURE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

FRED M. WYLIE,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 185

GILBERT REUTER, ET AL.,

Appellants,

vs.

STATE OF WISCONSIN EX REL. DEPARTMENT OF AGRICULTURE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

In the Trial Court.

Action by the State of Wisconsin, respondent, to enjoin Gilbert Reuter, appellant, from violation of a fluid milk market order of the State Department of Agriculture under Section 100.03, Wisconsin Statutes of 1939.

The complaint set out that the market order prescribed:

1. Standards of sanitation in production and handling.

2. Minimum prices for producers.

3. Minimum wholesale prices.

4. Minimum retail prices.

5. Labeling.

Violations of all of these by the defendant were set forth.

The answer denied only the allegation of violation of sanitary requirements, and asserted that:

1. "The minimum prices are unjust, unreasonable, discriminatory and unfair" in not providing a differential for "cash and carry".

2. The statute denies equal protection under the Federal constitution by delegation of judicial and legislative power to an administrative agency.

The trial court struck out the allegations of 1 above, on the ground that defendant had not exhausted his administrative remedy nor brought the matter to the court by an action to review administrative acts, as expressly required by the statute.

The trial court also sustained objection to testimony offered under a claim of discrimination in enforcement, and an "offer of proof" was made.

The trial court made findings that the defendant was handling insanitary milk and otherwise violating the order as alleged in the complaint, and entered judgment enjoining continuation of the violations.

The Stipulation of Issues on Appeal.

Upon appeal to the Supreme Court of Wisconsin, an abbreviated bill of exceptions was stipulated, and:

> "This stipulation is made upon agreement which is a part of the stipulation that the appellants will challenge on appeal only the constitutionality of the Milk Control Law because of discrimination, unlawful dele-

gation of powers, an absence of legislative standards for fixing price, and also the other point of the unconstitutional enforcement of the law."

Defendant made no formal assignments of error upon the appeal to the State Supreme Court, but in his brief made a statement of issues, as follows:

"1. Whether the 1939 Amendment to Section 100.03 renders the statute unconstitutional under Section 1 of the Fourteenth Amendment to the U. S. Constitution or Section 1, Article I, Wisconsin Constitution.

"2. Whether the pretended standards set for fixing prices were sufficiently definite to meet the requirements of a valid delegation of legislative power.

"3. Whether the defendants have been denied the equal protection of the laws by reason of the mode of administration of the act."

Issue 1, above, is the "discrimination" point referred to in the stipulation.

Issue 2, above, is the "unlawful delegation of powers, and absence of legislative standards for fixing price" referred to in the stipulation.

Issue 3, above, is the "other point of the unconstitutional enforcement of the law" referred to in the stipulation, as is definitely shown by the opening statement of the argument in this brief under this issue, as follows:

"At the trial, the defendants, in support of the charge of unconstitutional discrimination, made the following offer of proof which was excluded on the ground that it was irrelevant and incompetent."

* * * * * * *

The brief also quoted from the argument of defendants' counsel to the trial court, which appeared in the bill of exceptions, as follows:

"We are not complaining about the order. * * * But in the enforcement of the order our rights were invaded, * * *."

Decision of Supreme Court of Wisconsin.

The Supreme Court of Wisconsin affirmed the judgment of the trial court, and denied a rehearing.

In its opinion, the State Supreme Court first recited the above "statement of issues" in appellant's brief, and then the stipulation above; and the court then proceeded to discuss and decide the questions therein enumerated, as amplified by appellant's brief as set forth above.

The first question decided was that of the unconstitutionality of the territorial restrictions in the statute. (Appellant's first "statement of issue".) This was decided in favor of appellant. The court then held that the territorial restrictions were severable and the balance of the statute in force without them. This latter was but the construction of the State statute by the State court, is binding upon Federal courts, and presents no Federal question.

The second question discussed and decided by the Wisconsin Supreme Court was that of unconstitutional delegation for failure of sufficiently definite legislative standards for "fixing" prices. (Appellant's second "statement of issue".) This the court decided against appellant, on the authority of *State ex rel. Finnegan* v. *Lincoln Dairy Company*, 221 Wis. 1, in which the 1935 Wisconsin milk control law (in which the standards were stated with less clarity) was held not an unconstitutional delegation. This again was but the interpretation of a State statute by the State court, and of the division of State powers under the State constitution, and presents no Federal question.

Highland Farms Dairy v. *Agnew*, 300 U. S. 608, 57 Sup. Ct. 549, 81 L. Ed. 835.

In any event, the decision of the State courts upholding the constitutionality of the State milk control law against

the contention of an unconstitutional delegation, is correct under the recent decisions of this Court.

Nebbia v. *New York*, 291 U. S. 502, 54 Sup. Ct. 505, 78 L. Ed. 940;

Hegeman Farms Corp. v. *Baldwin*, 293 U. S. 163, 55 Sup. Ct. 7, 79 L. Ed. 259;

Borden's Farm Products v. *Baldwin*, 293 U. S. 194, 55 Sup. Ct. 187, 79 L. Ed. 281;

Mayflower Farms v. *Ten Eyck*, 297 U. S. 266, 56 Sup. Ct. 457, 80 L. Ed. 475;

Milk Control Board v. *Eisenberg Farm Products*, 306 U. S. 346, 59 Sup. Ct. 528, 83 L. Ed. 752;

United States v. *Rock Royal Co-op.*, 307 U. S. 533, 59 Sup. Ct. 993, 83 L. Ed. 1446;

See also:

West Coast Hotel Co. v. *Parrish*, 300 U. S. 379, 57 Sup. Ct. 578, 81 L. Ed. 703;

Mayo v. *Lakeland Highlands Canning Co.*, 309 U. S. 310, 60 Sup. Ct. 517, 84 L. Ed. 481;

Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S. 381, 60 Sup. Ct. 907, 84 L. Ed. 825;

Opp Cotton Mills v. *Administrator*, 312 U. S. 126, 61 Sup. Ct. 524 (Feb. 3, 1941);

United States v. *Darby Lumber Co.*, 312 U. S. 100, 61 Sup. Ct. 451 (Feb. 3, 1941).

The third question discussed and decided by the Wisconsin Supreme Court was that of unconstitutional discrimination in enforcement. (Appellant's third "statement of issue"). This also was decided against the appellant. This presented only a question of evidence and procedure and not a Federal question.

In any event, it was correctly decided by the State Supreme Court, for (1) the offer of proof was entirely lacking

any element of wilfulness and (2) an administrative remedy was available.

Mackay Co. v. *Little Rock*, 250 U. S. 94, 39 S. Ct. 428, 63 L. Ed. 863;

Keokuk & Hamilton Bridge Co. v. *Salem*, 258 U. S. 122, 42 S. Ct. 207, 66 L. Ed. 496;

(See distinction made, *Bohler* v. *Calloway*, 267 U. S. 479, 487, 49 S. Ct. 431, 69 L. Ed. 745);

Utley v. *St. Petersburg*, 292 U. S. 106, 54 S. Ct. 593, 78 L. Ed. 1155;

Hegeman Farms Corp. v. *Baldwin*, 293 U. S. 163, 172, 55 Sup. Ct. 7, 79 L. Ed. 259;

Rochester Tel. Corp. v. *United States*, 307 U. S. 125, 59 S. Ct. 754, 83 L. Ed. 1147;

Railroad Commission of Texas v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 60 S. Ct. 1021, 1023, 84 L. Ed. 1368; 311 U. S. 570, 61 S. Ct. 66, 167, 343, 85 L. Ed. 321.

The Wisconsin statute, sec. 100.03, Wis. Stats. 1939, provides:

"(5)(f) Determinations of the department under this subsection shall be by general order in the manner provided in section 93.18."

("93.18 Hearings; orders, service; procedure; revocation. (1) The department shall publish notice of any public hearing, except under subsection (3) of section 100.20 or under subsection (3) of section 100.19.

"(2) The department, in any matter arising under subsection (3) of section 100.20 or under subsection (3) of section 100.19, shall serve a complaint, prepared in the name of the department, upon the person against whom the complaint is made and shall accompany such complaint by notice of public hearing to be held in the matter not sooner than ten days after such service. The person against whom the complaint is made shall be entitled to be heard in person, or by agent or attor-

ney, and shall have subpoena process to compel the attendance of witnesses.

"(3) The department shall publish all general orders.

* * * * * * *

"(6) The department shall make its own rules of procedure and practice not inconsistent with any provision of this chapter or with any other provision of law governing such procedure or practice.

"(7) The department may revoke or amend any standard, order or regulation made under this chapter; provided, that public hearing has been held and notice thereof given in the same manner as is prescribed for the making of such standard, order or regulation. The revocation or amendment of any standard, order or regulation shall not affect any civil or criminal liability for offenses committed, penalties or forfeitures incurred, or rights of action accrued under such standard, order or regulation before the revocation or amendment thereof, whether or not in the course of prosecution or action at the time of such revocation or amendment; and any prosecution or action founded upon any such standard, order or regulation as it existed prior to the time of revocation or amendment, whether such prosecution or action was instituted before that time or not, shall proceed to judgment in the same manner and to the like purpose and effect as if the standard, order or regulation had not been revoked or amended.")

"(7) All questions of fact under this section shall be determined by the department, in written findings, and the provisions for judicial review of orders or regulations made under this section shall be as prescribed in chapter 102 in so far as the provisions thereof are applicable."

("102.23 Judicial review. (1) The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive; and the order or award, either interlocutory or final, whether judgment has been rendered thereon or not, shall be subject

to review only in the manner and upon the grounds following: Within thirty days from the date of an order or award originally made by the commission as a body or following the filing of petition for review with the commission under section 102.18 any party aggrieved thereby may commence, in the circuit court for Dane county, an action against the commission for the review of such order or award, in which action the adverse party shall also be made defendant. In such action a complaint, which need not be verified, but which shall state the grounds upon which a review is sought, shall be served with the summons. Service upon the secretary of the commission, or any member of the commission, shall be deemed completed service on all parties. * * * The commission shall serve its answer within twenty days after the service of the complaint, and, within the like time, such adverse party shall, if he so desires, serve his answer to said complaint, which answer may, by way of counterclaim or cross complaint, ask for the review of the order or award referred to in the complaint, with the same effect as if such party had commenced a separate action for the review thereof. With its answer, the commission shall make return to said court of all documents and papers on file in the matter, and of all testimony which may have been taken therein, and of its order, findings and award. Such return of the commission when filed in the office of the clerk of the circuit court shall, with the papers mentioned in section 270.72, constitute a judgment roll in such action; and it shall not be necessary to settle a bill of exceptions in order to make such return part of the record of such court in such action. * * * Upon such hearing, the court may confirm or set aside such order or award; and any judgment which may theretofore have been rendered thereon; but the same shall be set aside only upon the following grounds:

(a) That the commission acted without or in excess of its powers.

(b) That the order or award was procured by fraud.

(c) That the findings of fact by the commission do not support the order or award.

(2) Upon the trial of any such action the court shall disregard any irregularity or error of the commission unless it be made to affirmatively appear that the plaintiff was damaged thereby. * * *")

The refusal of the State supreme court to consider the issue of no "cash and carry" differential, upon the appeal or upon motion for rehearing, does not present a Federal question, and the issue not having been seasonably raised or decided by the State supreme court, it cannot be raised in the United States Supreme Court.

Herndon v. *Georgia*, 295 U. S. 441, 55 S. Ct. 794, 79 L. Ed. 1530.

Even if the defendants had not by stipulation waived that question, still a Federal question would not be presented in the United States Supreme Court, for the State statute provides an administrative remedy which the defendants have ignored.

Utley v. *St. Petersburg*, 292 U. S. 106, 54 S. Ct. 593, 78 L. Ed. 1155;

Hegeman Farms Corp. v. *Baldwin*, 293 U. S. 163, 172, 55 S. Ct. 7, 79 L. Ed. 259.

If any general question of the constitutionality of price fixing under the milk control statute could now be raised, it still would not present a Federal question, for when an argument "goes contrary to so many decisions", especially recent ones, "it must be condemned as unsubstantial." *Utley* v. *St. Petersburg*, 292 U. S. 106, 111. "The mere fact that the act fixes prices * * * does not raise substantial federal questions." *Mayo* v. *Canning Co.*, 309 U. S. 310, 318.

In any event, the attempted issue is ruled against appellant by the recent milk control decisions of this Court.

Nebbia v. *New York*, 291 U. S. 502, 54 Sup. Ct. 505, 78 L. Ed. 940;

Hegeman Farms Corp. v. *Baldwin*, 293 U. S. 163, 55 Sup. Ct. 7, 79 L. Ed. 259;
Borden's Co. v. *Ten Eyck*, 297 U. S. 251, 56 Sup. Ct. 453, 80 L. Ed. 669;
Highland Farms Dairy v. *Agnew*, 300 U. S. 608, 57 Sup. Ct. 549, 81 L. Ed. 835.

When an argument "goes contrary to so many decisions", especially recent ones, "it must be condemned as unsubstantial".

Utley v. *St. Petersburg*, 292 U. S. 106, 54 Sup. Ct. 593, 78 L. Ed. 1155.

The Appeal in This Court.

It is submitted that no substantial Federal question is presented by this appeal, and the attached motion to dismiss the appeal should be granted.

Failing this, it is submitted that as to any Federal question that may be presented, the decision so clearly must go against appellant that judgment of affirmance should be entered without further argument.

Since the statute expires of its own limitation on December 31, 1941, it likely will be moot before it can be reached and determined in this Court, and hence delay be the only result of this appeal. Under this circumstance, we feel justified in calling to this Court's attention that appellant's jurisdictional statement and statement directing respondent's attention to paragraph 3 of Rule 12 of this Court, was not served within the 5 days required by paragraph 2 of Rule 12, and that respondent does not waive this failure.

FRED M. WYLIE,
State Capitol, Madison, Wisconsin,
Respondent's Attorney.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 185

STATE OF WISCONSIN ex Rel. Department of Agriculture,

Plaintiff and Respondent,

vs.

GILBERT REUTER,

Defendant and Appellant.

MOTION TO DISMISS OR AFFIRM.

Upon the attached statement against jurisdiction and upon motion to dismiss or affirm, respondent moves in the alternative:

That the appeal be dismissed for failure to present a substantial Federal question and for failure to serve jurisdictional statement and notice of Rule 12 within the time required.

That the judgment be affirmed for the reason that any question raised is so clearly ruled against appellant by recent decisions of this Court that further argument is unnecessary.

Fred M. Wylie,
State Capitol, Madison, Wisconsin,
Respondent's Attorney.

(5039)

DECISIONS PER CURIAM, ETC., FROM OCTOBER 6, 1941, THROUGH JANUARY 5, 1942.*

No. 185. REUTER ET AL. *v.* WISCONSIN EX REL. DEPARTMENT OF AGRICULTURE. Appeal from the Supreme Court of Wisconsin. October 13, 1941. *Per Curiam:* The motion for leave to file statement of jurisdiction is granted. The motion to dismiss is also granted, and the appeal is dismissed for want of a substantial federal question. (1) *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 612; (2) *Nebbia* v. *New York*, 291 U. S. 502; *Borden's Co.* v. *Ten Eyck*, 297 U. S. 251; *United States* v. *Rock Royal Co-op.*, 307 U. S. 533, 562-71; *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157. *Messrs. Morris Karon* and *Walter D. Corrigan, Sr.* for appellants. *Mr. Fred M. Wylie* for appellee. Reported below: 237 Wis. 607, 296 N. W. 622.